Again in *Shaw* v. *Shaw*[2], a case where the plaintiff sought damages for breach of an implied warranty in a contract but omitted to allege "an implied warranty" in the pleadings though she alleged all the material facts, Denning L.J. said at page 441 —

"So long as those facts are alleged, that is sufficient for the court to proceed to judgment without putting any particular legal label upon the cause of action."

In construing the East Coast Rules it is, I think, essential to bear in mind their principal object and that was to simplify civil proceedings to suit the requirements of an unsophisticated peasantry who did not have the wherewithal to call on professional help (for instance the Rules even allowed subject to certain conditions pleadings to be in Malay). Also, like the present-day Supreme Court Rules, one of their objects was to prevent the opposite party from being taken by surprise and here I do not think that Chik or his widow can say that they have been taken by surprise. Also, the East Coast Rules have nothing like rule 6 of Order 19 of the Rules of Supreme Court which requires particulars to be stated where misrepresentation or fraud is relied on.

As to the second preliminary objection, the agreement between the plaintiff and the second defendant has, it is true, been adjudicated on in Civil Suit No. 113 of 1954 and judgment has been entered against the second defendant. It is equally true that that judgment says that if the land could not be transferred in compliance with that judgment then the plaintiff was entitled to damages against the second defendant, such damages to be assessed by the Assistant Registrar. But in my opinion the instant civil suit does in no way impinge upon that judgment because here what is sought is, first, only a declaration that the plaintiff is the owner of a half undivided share in the land and, secondly, that the first defendant, now the registered proprietor of the land, be ordered to transfer to the plaintiff this half share. In any event the plea of *res judicata* can only be taken advantage of by the second defendant against whom the earlier judgment had been obtained. She does not however raise it. It cannot be taken advantage of by the first defendant who was not a party to it. Accordingly this preliminary objection is also overruled.

This case will proceed to trial on a date to be fixed.

Order accordingly.

Solicitors:—*G. H. Goh & Co.; Jayadeva & Zahir.*

SAPIAHTOON v. LIM SIEW HUI

[O.C.J. (Buttrose J.) July 4, 1963]

[Singapore — Suit No. 1400 of 1959]

Contract—Building contract—Lump sum contract—House built not strictly to specifications and left uncompleted—Possession by plaintiff—Subsequent employment of another contractor to complete—Action for breach of contract—Counter-claim for balance of lump sum.

In a lump sum building contract it does not necessarily mean that the entire performance is a condition precedent to payment. It is not every breach of the promise to complete the work which absolves the employer from his promise to pay the price but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. If it is not one which goes to the root of the matter, the employer must pay the price and bring a cross-claim for defects and omissions or alternatively set them up in diminution of the price.

Cases referred to:—

(1) *Building Estate Ltd.* v. *A. M. Connor* [1958] M.L.J. 173.

(2) *Hoening* v. *Isaacs* [1952] 2 All E.R. 176.

ACTION FOR BREACH OF CONTRACT.

R. E. Redrup for the plaintiff.

R. Murugason for the defendant.

Cur Adv. Vult.

Buttrose J.: In this action the plaintiff, a married woman—a Malay—claims from the defendant, who described himself as a building contractor, damages for breach of contract in respect of a house at Coronation Road built for her by the defendant for $8,500 pursuant to an agreement in writing dated the 2nd November 1958. The plaintiff went into occupation of the house early in April 1959 and has lived in it ever since but she has refused to pay the balance of the purchase price. She alleges that the sum of $7,000 which she has paid to the defendant on account of the purchase price was paid upon a consideration which has failed and that the erection of the house was not completed, that much of the work was defective and of inferior quality and that the timber used was not in accordance with the terms of the contract. The plaintiff further claims special damages in the sum of $5,840 incurred in having the house completed and the defects remedied, including an architect's fee. The defendant denies the allegations and counter-claims the sum of $1,500 being the balance of the purchase price.

The position was that under the agreement to which I have referred the defendant was to build a house for the plaintiff "similar to that of Che' Safarwan at Geylang Serai for a sum of $8,500 including all labour charges, materials and water laid". The house was to be completed before April 1959 and it was also stated that the plaintiff was not to be responsible for any further payment except for the sum of $8,500 only.

That clearly, in my judgment, upon its true construction is an agreement for the sale of a house to be erected by the defendant for a lump sum of $8,500 and if the ordinary rule governing the discharge of contracts by performance were to be applied it would be necessary for the defendant in this case to show that he had performed his obligations fully and completely before he could receive anything for the work he had done. But as was pointed out by Whyatt C.J. in *Building Estate Ltd.* v. *A. M. Connor*[1] at page 174 the rigour of the common law rule requiring exact and precise performance by the promisor as a condition precedent to his right of recovery under a lump sum contract has been modified to some extent by judicial decisions and it is now well established that in certain circumstances a promisor who has substantially performed his side of the contract may sue on the contract for a lump sum but, of course, remains liable in damages for his partial failure to fulfil his contractual obligations.

This doctrine of substantial performance is enunciated clearly and conveniently in the case of *Hoening* v. *Isaacs*[2] by Denning L.J. as follows:—

> "....the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. Unless the breach does go to the root of the matter, the employer cannot resist payment of the price. He must pay it and bring a cross-claim for the defects and omissions, or alternatively, set them up in diminution of the price. The measure is the amount which the work is worth less by reason of the defects and omissions and is usually calculated by the cost of making them good".

I think the agreement in the present case falls within the class of contract referred to in the above passage.

The question I have to decide therefore is was there here a substantial compliance with the contract entitling the defendant to counter-claim from the plaintiff the balance of the purchase price subject of course to the deduction of such sum by way of damages as the plaintiff may be entitled to by reason of the defendant's partial failure to perform his part of the contract; or on the other hand was there such a breach of the contract such a partial and incomplete performance of it as goes to the root of the contract absolving the plaintiff from her promise to pay.

On the point as to whether the house was complete or not the evidence is overwhelmingly in favour of the plaintiff. A construction engineer put it as 60% complete. Mr. C. F. Wah the architect who inspected the house said it was not completed and there was evidence that it was an inexperienced job and the house was not properly built.

It also appeared that the defendant had little or no experience as a building contractor. He had served for some 30 years as a clerk/interpreter in the Police Force and is now a Government pensioner. The only two houses which he has constructed were Safarwan's and the present one and he admitted he knew very little about the construction of the plaintiff's house. He said that he left it all to his co-worker one Mah by name who has apparently conveniently disappeared taking all the documents relating to the construction of the plaintiff's house with him including, so it would seem, a sketch plan referred to by both the defendant and Yunos in their evidence.

There can be no doubt, in my judgment, that there was a partial failure by the defendant to fulfil his contractual obligations.

Now in assessing the degree of failure the house must be viewed in its proper perspective and in its class and in the price category in which it falls. It is very cheaply priced at $8,500 and is a Malay type house built for a Malay family.

While I accept the plaintiff's reasons for having to move into the house the fact remains that she and her family went into occupation in April 1959 and lived there and have done so ever since. It was not until nearly two years later that the defects were remedied and the house completed.

I do not think it was a condition of the contract that the timber to be used was to be kapor. I have no doubt that the plaintiff wanted kapor wood used and did in fact mention it to the defendant but that was because she was under the impression, apparently wrongly, that it had been used in the construction of Safarwan's house. The defendant's evidence was that no kapor timber was used in Safarwan's house at all.

I have come to the conclusion that there was here sufficiently substantial compliance with the terms of the contract to entitle the defendant to claim for the balance of the contract price against which the plaintiff may set up the defects and omissions in diminution thereof. The measure being the amount which the work is worth, less by reason of such defects and omissions and is

usually calculated by the cost of making them good. In this case, according to the plaintiff, the cost was $5,500.

Now it was clearly of the essence of the contract that the plaintiff's house was to be similar to Safarwan's house at Geylang Serai and I construe the word "similar" as substantially similar in all respects. While the evidence in this matter is not as clear as it might be it appeared that Safarwan's house was a well constructed, well finished and completed structure and he was very pleased with it. The plaintiff's house, quite clearly, was not. I think some of the work carried out by the new contractor who was called in was due to the necessity for repairs caused by fair wear and tear and that in some instances materials of better and more expensive quality were used than were originally within the contemplation or intention of the parties or used in the construction of Safarwan's house. I think the sum of $5,500 therefore is too high a figure. It is difficult to make an exact assessment of the amount required but after giving the matter the best consideration I can on the materials available I consider a figure of $3,500 is appropriate. From this sum must be deducted the $1,500 due to the defendant under the contract, leaving a balance of $2,000 to which must be added a sum of $290 being the architect's fee.

In the result, therefore, there must be judgment for the plaintiff for $2,290 and costs.

Judgment for the plaintiff.

Solicitors:—*Osborne-Jones & Redrup; Murugason & Co.*

LEE KHOON CHENG & ORS. v. REGINA

[A.Cr.J. (Ambrose J.) July 5, 1963]

[Singapore — Magistrate's Appeal No. 283 of 1962]

Gaming—Gaming in public—Common Gaming Houses Ordinance, 1961 s.7(2)—Public place—Meaning of —Onus—Presumption in s.7(7) of the Ordinance.

"Public place" and "place" for purposes of gaming in public are defined in section 2(1) of the Common Gaming Houses Ordinance, 1961. To prove that a place is a public place all that need be proved is that the place is one to which the public has or may have access. The prosecution is not required to prove that the place is one to which the public have a right of access.

When a person is shown to be playing a game of chance or mixed game of chance and skill in a public place, a presumption arises under section 7(7) of the Ordinance that the person was gaming in public unless the contrary is proved.

Case referred to:—

(1) *Brannan* v. *Peek* [1947] 2 All E.R. 572.

MAGISTRATE'S CRIMINAL APPEAL.

R. Murugason for the appellant.

R. S. Chapkhana (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Ambrose J.: The four above-named appellants were charged with the offence of gaming in public under section 7(2) of the Common Gaming Houses Ordinance, 1961. It was alleged that they on or about the 22nd November, 1962, at about 10.30 p.m. at a coffee-stall at Kitchener Road, Singapore, did game in a public place by playing a game of mahjong with chips. They were convicted and sentenced to a fine of $40 each by a Magistrate.

Two points were taken by counsel for the appellants. The first was that the hall where the offence was alleged to have been committed was not a public place. It was said that the coffee-stall was in the front portion of the premises and closed at 9 p.m.; that the hall ceased to be part of the coffee-stall after 9 p.m.; and that the public had no right of access to it. It was argued that a place cannot be said to be a public place unless the public have a right of access. Counsel relied on the case of *Brannan* v. *Peek*(1). In that case it was decided that a public house is not a public place within the meaning of section 1(4) of the Street Betting Act, 1906, because it is not a place to which the public have an unrestricted or a restricted right of access. Section 1(4) provides:

> "the word 'public place' shall include any public park, garden, or seabeach, and any unenclosed ground to which the public for the time being have unrestricted access, and shall also include every enclosed place (not being a public park or garden) to which the public have a restricted right of access, whether on payment or otherwise, if at or near every public entrance there is conspicuously exhibited by the owners or persons having the control of the place a notice prohibiting betting therein."

It is to be observed that section 2(1) of the Common Gaming Houses Ordinance, 1961, provides:

> " 'public place' means any place to which the public has or may have access . . . . ;
>
> 'place' means any house, office, room or building and any place or spot, whether open or enclosed,. . . . ;"

To prove that the hall was a public place, the prosecution did not have to prove that the public had a right of access, restricted or otherwise, into the hall. All that the prosecution had to prove was that the hall was a place to which the public has or may have access. The Magistrate found that the hall was such a place. I can see no reason for setting aside that finding.

The second point taken by counsel for the appellants was that the prosecution did not prove that the players were playing for money or